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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-748

In The Matter of:

JOHN D. DELGADO,

Petitioner.

REPLY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Does this Court have jurisdiction to grant review of a State Supreme Court decision where that decision was based upon adequate and independent grounds of state law?

II.

Does this Court have jurisdiction to grant review of a State Supreme Court decision where the Petition for Writ of Certiorari fails to present a substantial federal question?

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OPINION BELOW

The Opinion below appears at 306 S.E. 2d 591, ___ S.C. ___ (1983), captioned as In The Matter of John Dennis Delgado. Petitioner has appended the opinion below as Appendix "A" to his Petition.

JURISDICTION

This Honorable Court is without jurisdiction to consider this Petition. Petitioner has attempted to invoke jurisdiction

pursuant to 28 U.S.C. 1257(3). However, for the reasons set forth below, Respondent respectfully submits that said section is inapplicable to the instant case.

PROVISIONS OF STATE LAW INVOLVED

CONSTITUTION OF SOUTH CAROLINA, Article 5, §4; §15-1-170, CODE OF LAWS OF SOUTH CAROLINA (1976); §14-3-640, CODE OF LAWS OF SOUTH CAROLINA (1976); Rule 32, RULES OF THE SUPREME COURT OF SOUTH CAROLINA; SOUTH CAROLINA RULE ON DISCIPLINARY PROCEDURE.

STATEMENT OF THE CASE

Petitioner is an attorney licensed to practice law in the State of South Carolina. This Petition seeks review of a finding by the Supreme Court of South Carolina that Petitioner was guilty of professional misconduct arising out of two unrelated incidents.

First, Petitioner was found to have improperly communicated with a juror in a case in which Respondent was appearing as defense counsel. In a term of General Sessions Court for Lexington County, South Carolina, Respondent appeared as defense counsel at the trial of a criminal defendant named Binkley. As soon as the verdict was rendered in the Binkley case a jury was drawn in the case of State v. Schnupper. Respondent also represented Schnupper and participated in his trial. The Schnupper jury panel included one William Jenkins, who had also served as a juror in the Binkley case.

During a break in the Schnupper trial two jurors, Seigler and Jumper, who had served only on the Binkley case, were approached by Petitioner and a discussion began concerning the Binkley trial. Shortly thereafter the group was approached by William Jenkins, who was told by Petitioner

that it would be permissible for him to join the conversation as long as the Schnupper trial was not discussed. The conversation continued for another five to twenty minutes with Jenkins present. During the course of this conversation "jury dynamics" were discussed, along with the role of an attorney defending one whom he knows to be guilty. Jenkins asked Petitioner several questions as to his background and came away "impressed" by Petitioner. Petitioner was also overheard to make remarks concerning how "the tables were stacked against the defense" in a criminal trial. Petitioner has never denied communicating with Juror Jenkins during the course of the trial. He does not seek review of this independent finding of professional misconduct.

The second incident in which the Court below found separate instances of profes-

sional misconduct involved Petitioner's participation in a press interview with one of his clients. Respondent was engaged to represent J. C. Shaw, a convicted murderer presently under sentence of death, in his post conviction relief proceedings. The trial on the post conviction relief question generated a large amount of media attention. At the close of the trial Petitioner attempted to arrange a press conference for his client which was disapproved by the prosecutor. The South Carolina Department of Corrections had a policy in place at all relevant times which required approval of Corrections authorities, defense counsel, and the prosecuting attorney before press interviews could be conducted with death row inmates.

Although Petitioner was aware of the prosecuting attorney's objections, he set out to arrange for Holly Gatling, a newspaper reporter and personal friend of

Petitioner, to interview Shaw at the Central Correctional Institute (CCI). For the reasons set out in its opinion the Court below found as a matter of fact that Petitioner had misrepresented the purpose of his and Ms. Gatling's visit to C.C.I. The Court further found as a matter of law that the misrepresentation was a violation of DR 1-102(A)(4), which prohibits a lawyer from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation.

At various times in the proceedings below, Petitioner has admitted that his purpose in participating in the extrajudicial statements to the press was to "enhance his client's position," to "humanize" his client, and to "create a fair, neutral public environment for the disposition of [Shaw's] case." The Court below found this to be outside of the

range of acceptable behavior for attorneys dealing with the press and that, therefore, Petitioner had violated yet another provision of the Code of Professional Responsibility, DR 7-107(G).

ARGUMENT

This Court Lacks Jurisdiction to Grant Review in the Instant Case.

I

The Lower Court's Decision was Based on Adequate and Independent State Law Grounds.

Counsel for Petitioner has skillfully placed a spotlight on that portion of the opinion below which he apparently feels warrants federal review. In doing so he seeks to portray the action below as a series of decisions, each independently reviewable, rather than one decision based upon several separate and independent grounds. However, a cursory review of that opinion reveals that the Court

below based its decision to sanction Petitioner on three separate violations of the Code of Professional Responsibility, two of which were completely independent of any possible federal question. 1/ Pursuant to its rulemaking authority, 2/ the South Carolina Supreme Court amended Rule 32, Supreme Court Rules, effective March 1, 1973, to provide for the adoption of the Code of Professional Responsibility as a basis for disciplinary action in South Carolina. Having become a valid rule of Court, the Code of Professional Responsibility has had, at all relevant times, the force and effect of State Law. Weil v. Neary, 278 U.S. 160, 73 L.Ed. 243, 49 S.Ct.

1/ Section 5 of the South Carolina Rule on Disciplinary Procedure defines misconduct as, inter alia, violation of the Code of Professional Responsibility.

2/ Article 5, §4, Constitution of South Carolina; §§ 15-1-170 and 14-3-640, CODE OF LAWS OF SOUTH CAROLINA (1976).

144 (1929); State v. Atterbury, 124 S.E. 648, 129 S.C. 464, concurring opinion of Justice Aycock (1924); Cambron v. Canal Insurance Company, 269 S.E.2d 426, 246 Ga. 147 (1980).

Viewed in this light it becomes clear that each time the lower court found a violation of the Code of Professional Responsibility it also found a separate, adequate, and independent state law ground upon which it could base its decision to sanction the Petitioner for his professional misconduct. These grounds are analyzed below.

First, there is the unchallenged finding by the lower court that Petitioner violated DR 7-108(B)(1) by improperly communicating with a member of the jury in a case with which he was connected as a lawyer. There was never any question as to Petitioner's participation in the conversation with the juror. Following

his pattern of admitting the material allegations of this charge, Petitioner has not sought review of this finding of misconduct and the concomitant application of a sanction. In failing to seek such review, Petitioner virtually concedes that such finding is an adequate and independent state law ground upon which the lower court based its decision. Examples where the Supreme Court of South Carolina and other courts have disciplined attorneys for improper communications with jurors or their families are numerous. In Re Holman, ___ S.C. ___, 286 S.E.2d 148 (1982); Matter of Anonymous, ___ S.C. ___, 298 S.E.2d 450 (1982); Matter of Terry, 394 N.E.2d 94 (Ind. 1979); Florida Bar v. Peterson, 418 So.2d 246 (1982); In Re Brown, 197 S.E.2d 814, 157 W.Va. 1 (1973).

The Peterson case is particularly instructive because, as in the instant

case, there was no evidence that the offending attorney actually discussed the merits of the pending case with the jurors. Peterson appeared at a restaurant where two sitting jurors were eating during the lunch break in the trial of a case. Peterson then seated himself at the jurors' table and chatted with them while they had lunch. Although there was no evidence that Peterson discussed the pending case or directly attempted to "sway" the jurors, he was, nevertheless, publically reprimanded by the Florida Supreme Court.

Next, we must consider the finding that Petitioner misrepresented the purpose of his and Ms. Gatling's visit to C.C.I. The lower court set out the various elements of the misrepresentation in its opinion, so they need not be repeated here. It should suffice to say that the lower court made a factual determination that these elements constituted misrepresenta-

tion. Misrepresentation is, by express terms, a violation of DR 1-102(a)(4). Although Petitioner attempts to attack the sufficiency of this finding, it is clear that this Court will not disturb factual findings of a lower court. Chemical Bank v. City Bank of Portage, 160 U.S. 646, 40 L.Ed. 568, 16 S.Ct. 417 (1896). Thus, we have a second independent and adequate state law ground upon which the lower court based its decision to sanction Petitioner. Examples where attorneys have been disciplined for fraud, deceit, or misrepresentation abound. In Re Duncan, 81 S.C. 290, 62 S.E. 406 (1908); In Re Gadsden, 89 S.C. 352, 71 S.E. 952 (1911); In Re Smith, 255 S.C. 347, 179 S.E.2d 35 (1971); In Re Bishop, 263 S.C. 289, 210 S.E.2d 235 (1974); In Re Cauthen, Eubanks, and Rowland, 267 S.C. 448, 229 S.E.2d (1976); In Re Elliott, 268 S.C. 522, 235 S.E.2d

111 (1977); Matter of Ruben, 273 S.C. 154, 255 S.E.2d 348 (1979); Matter of Easler, 275 S.C. 269, 269 S.E.2d 765 (1980); Matter of Davis, ___ S.C. ___, 280 S.E.2d 644 (1981); Matter of Rothwell, ___ S.C. ___, 296 S.E.2d 870 (1982); Matter of Dewitt, ___ S.C. ___, 304 S.E.2d 270 (1983); In Re Brooks, 292 S.E.2d 686 (Ga. 1982); Matter of McCain, 425 N.E.2d 645 (Ind. 1981); Florida Bar v. Abrams, 402 So.2d 1150 (1981).

This Court has often ruled that it has no jurisdiction to review the judgment of a state court which rests upon two grounds, one of which is federal and the other non-federal in character if the non-federal ground is independent of the federal ground and adequate to support the judgment. Fox Film Corporation v. Muller, 296 U.S. 207, 80 L.Ed. 158, 56 S.Ct. 183 (1935); Edelman v. California,

344 U.S. 357, 97 L.Ed. 387, 73 S.Ct. 293 (1953); Chemical Bank v. City of Portage, supra; Rogers v. Jones, 214 U.S. 196, 53 L.Ed. 965, 29 S.Ct. 635 (1909); Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977). As we have seen above, the lower court in the instant case had more than one independent and adequate state law ground upon which it based its decision.

It has also been held by this Court that it is not enough that a federal question may have been raised and overruled in the state court, but it must be shown that the federal question was controlling in the disposition of the case. President, Directors and Company of Commercial Bank v. Buckingham's Executors, 46 U.S. 317, 12 L.Ed. 169 (1847); Honeyman v. Hanan, 300 U.S. 14, 81 L.Ed. 476, 57 S.Ct. 350 (1935). In fact, this Court has held that equal reliance on state and federal grounds by

the lower court was sufficient to preclude Supreme Court review. Jankovich v. Indiana Toll Road Comm., 379 U.S. 487, 13 L.Ed.2d 439, 85 S.Ct. 493 (1965). In Jankovich the defendant constructed a toll road parallel to an airport. The height of the toll booth violated a city ordinance regulating the height of structures near the airport. The Indiana Supreme Court held that the ordinance violated the just compensation clause of the Indiana Constitution as well as the 14th Amendment to the United States Constitution. This Court ruled that the equal reliance upon the Indiana Constitution by the lower court precluded federal review.

Applying the reasoning of the above-cited decisions to the instant case leads to the inescapable conclusion that this Court must deny review because the alleged federal question raised by Petitioner was not controlling in the disposition of the

cause below. At best, Petitioner can only show that his federal question was merely one of three independent grounds upon which the Court based its decision to sanction him for his professional misconduct. The Petition should, therefore, be denied for this reason alone.

II

The Petition Fails To Present A Substantial Federal Question

A reading of Petitioner's footnote number 4 reveals the true basis of this appeal and exposes the entire matter as being one of purely local interest. As footnote number 4 indicates, Petitioner has taken this action seeking to lessen the sanction imposed upon him by the lower court. Petitioner apparently feels that the lower court may opt for some lesser sanction if one or two of the findings against him are overturned by this Court.

Such an argument is rank speculation and has no place in a Petition for appellate review. Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955). In the Rice case this Court granted certiorari to consider the 14th Amendment claims of an Indian widow whose deceased husband had been denied burial in a "white only" cemetery. The Court later dismissed the writ as improvidently granted because it learned that the attorneys had failed to inform it that a statute enacted since the Iowa Supreme Court had ruled and before certiorari had been granted now forbade racially restrictive covenants in Iowa. In dismissing the case the Court stated:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to

> satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants." 99 L.Ed. at 901.

In order to grant review this Court must find a substantial federal question as defined within the plain language of 28 U.S.C. 1257. That is, the case must involve a right or immunity created by the Constitution or Laws of the United States. Pan Am Petroleum Corp. v. Superior Court of Delaware In and For New Castle County, 81 S.Ct. 1303, 366 U.S. 656, 6 L.Ed.2d 584 (1961). In addition, it must be a question of substance. Rice v. Sioux City Memorial Park Cemetery, Inc., supra. Petitioner's attempt to lessen his sanction is, at worst, of interest only to himself. At best, it is a matter of purely local concern. Whether or not the lower court would lessen the sanction upon remand is a matter of speculation and not a proper concern for this Court.

CONCLUSION

For the above-stated reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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BY: _____
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Columbia, South Carolina

November 30, 1983.